

OCT 2 1989

In The

JOSEPH F. SPANIOL, JR.
CLERK**Supreme Court of the United States****October Term, 1989**

GEARY ALAN SOSEBEE,*Petitioner,*

v.

STATE OF GEORGIA,*Respondent.*

**On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Georgia**

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAULA K. SMITH
*Counsel of Record for
Respondent*
Assistant
Attorney General

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant
Attorney General

WILLIAM B. HILL, JR.
Deputy
Attorney General

SUSAN V. BOLEYN
Senior Assistant
Attorney General

Please serve:

PAULA K. SMITH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3351

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider alleged confrontation violations under the Georgia child hearsay statute where the child is available at trial and the reliability of the child's statements are established prior to their admission?

II.

Should this Court grant certiorari to consider a federal question not properly raised below?

III.

Should this Court consider an alleged confrontation abridgement where Petitioner declined to have the trial court call the child victim to testify?

IV.

Should this Court grant review to consider an alleged conflict among state statutes on nonconstitutional matters?

V.

Should this Court grant certiorari to consider an issue of public policy falling within the legislative realm?

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GEARY ALAN SOSEBEE,

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v.

STATE OF GEORGIA,

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On Petition For A Writ Of Certiorari
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BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, Geary Alan Sosebee, was indicted by the Fayette County, Georgia, Grand Jury on September 9, 1986, under 3 separate indictments involving sexual abuse upon his 5 year old daughter, Holly Sosebee. (R. 18-23; 24). Specifically, indictment number 86R-224 charged Petitioner with one count of child molestation and one count of aggravated assault upon Holly Sosebee on April 12, 1986. Indictment number 86R-225 charged

Petitioner with one count of aggravated child molestation, one count of aggravated sodomy, and one count of rape upon Holly Sosebee between the period September 1, 1985 – April 12, 1986. Indictment number 86R-226 charged Petitioner with one count of incest upon his daughter Holly Sosebee during the period September 1, 1985 – April 12, 1986.

On September 22, 1986, Petitioner filed a pre-trial motion in limine, seeking to bar the state from eliciting from state witnesses under O.C.G.A. § 24-3-16 any statements made by the victim describing the sexual acts. (R. 70). The constitutional challenge to this statute was denied by the trial court on October 17, 1986. (R. 83). Petitioner successfully sought an interlocutory review of this decision, with the Georgia Supreme Court granting the application for such an appeal on November 4, 1986. (R. 96).

On June 19, 1987, the Supreme Court of Georgia adopted a construction of this statute, requiring that before the completion of the state's evidence, the trial court shall, at the request of either party, call the child-victim to the stand, inform the jury that the court was calling the victim, and then permit examination of the victim. *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987). The court further held that the construction given the statute mooted any constitutional argument. *Id.* Rehearing was denied July 29, 1987.

Upon a jury trial on September 21 – October 6, 1987, the jury found the Petitioner guilty on all counts under all three indictments. (R. 235-38). Under indictment number 86R-224, Petitioner was sentenced to twenty years to

serve for child molestation and to a consecutive twenty year sentence for aggravated sodomy. (R2-39). Under indictment number 86R-225, Petitioner was sentenced to concurrent twenty year sentences on the counts of aggravated child molestation and aggravated sodomy and a consecutive twenty year sentence for rape to follow the sentences under the first indictment. (R. 240). Under indictment number 86R-226, Petitioner was sentenced to a concurrent twenty year sentence for incest. (R. 2-41).

On direct appeal, the Petitioner reasserted his constitutional challenge to O.C.G.A. § 24-3-16 as well as additional errors. The Georgia Court of Appeals found these allegations to be without merit and affirmed the Petitioner's convictions and sentences on February 2, 1989. *Sosebee v. State*, 190 Ga. App. 746, ___ S.E.2d ___ (1989). The opinion was amended when the motion for rehearing was simultaneously denied on July 29, 1987. The Georgia Supreme Court subsequently denied certiorari.

A review of the facts presented at the Petitioner's trial is necessary for this Court's determination of whether this petition should be granted. Therefore, a summary of the evidence submitted at the Petitioner's trial is presented as follows.

On April 12, 1986, Petitioner and his wife appeared at a divorce hearing concerning temporary custody of their two children. (Trial transcript 1462) (hereinafter designated "T."). The presiding judge ordered that the children be temporarily placed in the custody of the Fayette County, Georgia, Department of Family and Children Services, (hereinafter referred to as DFACS). (T. 1466-67). After the hearing, the children's mother, Leslie Sosebee,

and two of her friends picked up the children from the babysitter and took them immediately to DFACS. (T. 1731). No one said anything to the children about Petitioner. (T. 1732).

On April 16, 1986, Fayette County Sheriff Juvenile Investigator Opal McRaney met with the Petitioner's five-year old daughter, Holly Sosebee, at the request of DFACS child protection services worker Angela Stinchcomb regarding possible sexual abuse. (T. 321-22). Ms. McRaney had been an investigator for over nine years and had received special training in investigating child abuse and sex crimes. (T. 323-24). Following a hearing outside the presence of the jury (T. 332-81), the investigator then testified as to the substance of the interview. The investigator testified that upon her initial arrival at the department, she overhead Holly tell the Petitioner that she would not tell the DFACS worker their special secret. (T. 385). In the subsequent interview, Holly indicated that she liked her father and that she was "his special girl," while describing her mother as evil. (T. 389). The child agreed to discuss her special secret if the DFACS worker would leave the room. (T. 390). The child then related that her secret was a nasty secret involving a monster wearing an ugly mask and making her bottom hurt; the monster would not do anything to her sister because the monster did not like the sister. (T. 391-92). The child then identified the Petitioner as the monster and described how the Petitioner touched her vaginal area with his hand and put his tongue in her mouth. (T. 393). Using anatomically correct dolls, the child demonstrated how the Petitioner would put his face in her genital area and later placed the doll she had identified as her father upon the doll she

identified as herself and simulated up and down movements. (T. 398). Throughout this interview, the investigator observed the child rubbing herself occasionally between her legs; when asked why, the child responded that it was nasty and felt good. (T. 399).

In a second interview several days later, Holly told the investigator that three other men, along with her father, had done sexual things to her, describing how her father went first, how she had been picked up and placed on his "peed." (T. 403-404). The child told the investigator that pictures were made of her as the men took turns doing this. *Id.*

The child's pediatrician, Dr. Joel Goldstein, examined Holly on April 17, 1986. (T. 830). The pediatrician had last seen Holly on March 6, 1986, and a general vaginal examination indicated it to be in a normal condition for a five-year old. (T. 833-34). However, on April 17, the child's vagina visibly appeared different, with the size of the vaginal opening resembling that of an adult women more than that of a child. (T. 832). The pediatrician then referred the child to an obstetrician/gynecologist, Dr. Darrell Martin. (T. 832).

The gynecologist, assisted by nurse/midwife Terry Gillenwaters, examined Holly. (T. 487). To obtain a vaginal culture, the nurse used a speculum normally used on females teenaged or older; ordinarily, the nurse would have used a Q-tip on a child of Holly's age to obtain such a culture. (T. 487; 461-62). The child's vaginal opening was two to three centimeters in size, approximately the width of one and one-half fingers, and the hymen was not intact. (T. 463). The child had a vaginal infection,

hemophilus, which is generally associated with sexual abuse in pre-pubertal girls. (T. 465-66; 494). The gynecologist pointed out that it was not uncommon for a man to transmit this infection while exhibiting no symptoms himself. (T. 494).

The gynecologist also examined the child one month later at a hospital while she was anesthetized. (T. 491-92). Holly's vaginal opening measured 1.7 by 1.7 by 1.8 centimeters, closer to the size of a teenaged or older female as the average size of a vaginal opening for an eight-year old girl was under five millimeters or one-half centimeter. (T. 491-93).

The pediatrician testified that hemophilus is rarely found in non-sexually active children and usually found in sexually-active adult women. (T. 830-36). A finding of hemophilus in a small child generally indicates penile transmittal, and a combination of the hemophilus bacteria and stretching of the vagina as seen in Holly indicated some "ongoing sexual activity involving penile insertion in the child." (T. 836-37).

In June 1986, clinical psychologist James Stark interviewed Holly twice. (T. 964). The child appeared to be traumatized by something having to do with her father. (T. 988). The psychologist also observed numerous behavioral problems generally associated with child sexual abuse. (T. 987-94). Following a hearing outside the presence of the jury (T. 599-611), the psychologist related the child's description of sexual acts between Holly and her father, including oral-anal acts, oral-vaginal acts, sexual intercourse, kissing in which her father put her tongue in her mouth, and the father putting his mouth on her

breasts and touching her vagina with his hand. (T. 995, 997-98). The child stated that she had been told by her father not to tell because if she told, he might get in trouble. (T. 998). The child also described a group sex scene involving her father and three other men taking turns having intercourse and various forms of oral sodomy with the child. (T. 1001-1005).

The psychologist referred Holly to Nancy Copeland Aldridge, a psychotherapist and licensed clinical social worker, for additional evaluation and therapy. (T. 615, 622-23). The psychotherapist had approximately 46 sessions with the child. (T. 626). The child disclosed that she had secrets and that she would die if she told them and would not see Jesus. (T. 627). The child later described the secrets as involving her father touching her anus with his tongue and her vagina with his tongue, his hand and his penis. (T. 635-36). Petitioner would kiss her on the mouth, put his tongue in her mouth, and put his penis in her vagina which the child claimed hurt. (T. 638-40). The child indicated that the father would put something sticky on his penis and that something would come out of it when he put it in her vagina. (T. 639). Holly indicated that these incidents occurred in her father's bedroom about once a week and that she had been told by her father not to tell. (T. 639). Holly described these events as occurring in their new house, both when her parents lived together and after her father moved out. *Id.* The child also described a group sex incident involving her father and three other men named Don, Scott, and Michael, during which the child said she had been made to drink something which made her sleepy and that movies were made of what they did. (T. 648-49). On January 3,

1987, Holly denied that her father or anyone else had ever bothered her or sexually abused her. (T. 654-58). The child then began to fluctuate as to what happened and her memory faded as to details. *Id.* Finally, on May 6, 1987, the child would only tell the psychotherapist that her father did bad things to her but that she could not remember what they were. (T. 658). The psychotherapist concluded that Holly exhibited many of the general behavioral indicators associated with the child abuse syndrome and that Holly fitted into the syndrome, including the recantation. (T. 664, 687).

In his defense, Petitioner presented a neighbor who had seen the child left with babysitters (T. 1095); Donald Evans who had been accused by the child of molesting her (T. 1115); two individuals in an attempt to impeach the juvenile investigator (T. 1153, 1179); a psychiatrist who examined the Petitioner and concluded that he was not a pedophile (T. 1202); two good character witnesses (T. 1331, 1337); a gynecologist who treated Petitioner's wife for vaginitis and discussed how certain infections could be transmitted through non-sexual activity (T. 1345); a urologist who treated the Petitioner and found no sexually transmitted disease (T. 1361); a clinical psychologist who had dealt with ten sex offenders and opined that the Petitioner did not fit their criteria (T. 1523); a clinical psychologist who conducted a penile plethysmograph and concluded the Petitioner did not appear to be a pedophile (T. 1578); two witnesses in an attempt to impeach the credibility of the DFACS worker (T. 1620; 1718); a day care sitter describing one incident in which the child refused to leave with a particular babysitter (T. 1661); and two witnesses who stated that the juvenile

investigator had a bad reputation. (T. 1722; 1725). Petitioner also testified in his defense, denied the accusations, and described how his daughter had sexually abused herself. (T. 1376).

The jury found the Petitioner guilty on all counts. (T. 1905-1906).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE GEORGIA CHILD HEARSAY STATUTE DOES NOT VIOLATE THE RIGHT TO CONFRONTATION.

Petitioner contends that the Georgia Child Hearsay Statute is unconstitutional, contending that it allegedly denies a defendant the opportunity for "face-to-face" confrontation, despite the requirement that the declarant/child be available at the trial. Petitioner also contends that the statute does not permit "effective" cross-examination of the child and also complains of the lack of contemporaneous cross-examination when the child made statements, such as in this case for purposes of investigation, evaluation and treatment. Respondent submits that the construction adopted by the Georgia Supreme Court, and as applied in this case, does not violate the right to confrontation as the statute requires the child/declarant to be available at trial and that indicia of reliability of the child's statements be shown prior to their admission so that this allegation provides no basis for the grant of certiorari.

In 1986, the Georgia Legislature enacted the following statute, effective July 1, 1986:

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

O.C.G.A. § 24-3-16. Petitioner challenged the constitutionality of this statute on an interlocutory appeal. The Georgia Supreme Court construed the term "if the child is available to testify in the proceedings" as requiring the child to be present and requiring the trial court to call the child as the court's witness if either party asks. *Sosebee*, 257 Ga. at 299. By having the trial court call the child as a witness, any potential adverse implication arising to the defendant by calling the child is avoided. *Id.*

Here, the trial court conducted hearings outside the presence of the jury to establish the indicia of reliability of the child's statements to juvenile investigator McCraney (T. 332-81); to psychotherapist Aldridge (T. 518-97); and to clinical psychologist Stark (T. 599-611), prior to the admission of the child's statements to these three individuals. The trial court found as fact that the child was available to testify. (T. 379). Relying upon *Dutton v. Evans*, 400 U.S. 74 (1970), the trial court then found that the statements of the 5 year old victim had sufficient indicia of reliability to warrant their admission. (T. 378-81; 596-97; 611). Specifically, following the hearing on the statements to juvenile investigator McCraney, the

trial court ruled that the child was met by the investigator who was in sheriff's uniform, and that the child's verbal and non-verbal statements through the use of dolls "covers a subject matter that a 5 or 6-year old child would not know, the sexual nature not being information that a child of that age would have." (T. 380-81). The court further found that the statements of the victim were "the type of story that a child of this age would not make up even if she had knowledge of these sexual matters." *Id.* The court based these findings on the fact that the child of that age was in a strange building for the first time, in the company of an unknown lady who was in uniform. *Id.* The court found these facts evidenced reliability of the statements.

Similarly, as to psychotherapist Aldridge, the trial court relied in part upon its earlier rulings and noted that a child of that age was not "ordinarily mentally capable of making up" such details. (T. 596-97). The court also found that the demeanor of the psychotherapist convinced the judge that words had not been put in the victim's mouth. (T. 596-97). As to the clinical psychologist, the trial court relied in part upon the two previous rulings and found sufficient indicia of reliability. (T. 611). In addition, the trial court conducted an *in camera* inspection of the files of the psychotherapist and investigator (T. 597, 611) and gave any exculpatory evidence to Petitioner. The trial court also conducted an *in camera* inspection of the DFACS file and gave Petitioner the *Brady v. Maryland*, 373 U.S. 83 (1985), material. (T. 5). Further, after the prosecutor informed Petitioner under *Brady* on the first day of trial that the child had recanted

all her statements in a meeting the previous week with the prosecutor (T. 42), the trial court granted Petitioner's request for adjournment for the afternoon so that Petitioner could follow up on this information. (T. 44). Neither the prosecutor nor Petitioner asked that the child be called as a witness. (T. 1050; 1085-88).

Under these facts, Respondent submits that no violation of the right to confrontation has been shown. Petitioner contends that the statute is unconstitutional because it permits the statement of the child to be utilized even though the child is available. Petitioner claims such out-of-court declarations cannot *per se* be utilized unless the unavailability of the declarant is established. This Court has previously rejected such assertions. *Dutton v. Evans*; *California v. Green*, 399 U.S. 149 (1970) (prior inconsistent statements admitted as substantive evidence where declarant available at trial). Further, the confrontation clause is satisfied by the "opportunity" for cross-examination, not cross-examination "effective" in whatever way and to whatever extent a defendant might wish. *United States v. Owens*, ___ U.S. ___, 108 S.Ct. 838 (1988); *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989 (1987); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (*per curiam*). Finally, as this Court recently noted, confrontation is a trial right. *Ritchie*, 107 S.Ct. at 999. This Court has also declined to require contemporaneous cross-examination as a constitutional matter, noting that an inability to cross-examine a witness at the time a prior statement was made is not of crucial significance where the defendant is assured of cross-examination at trial. *California v. Green*, 399 U.S. at 158.

Here, Petitioner had the opportunity to cross-examine the child/declarant but declined to do so. Further, the reliability of any statements the declarant made out of court were established prior to their admission. Petitioner was further given wide latitude in conducting full and sifting cross-examinations of these three individuals as to what they had heard, including inquiry before the jury as to the potential for their having influenced the statements of the child. (T. 407-54; 694-798, 816-827; 1005-1080). The trial court also permitted Petitioner to attack the credibility of the DFACS worker although this individual was not present and did not testify at trial about her interviews with the child. (T. 1695-96). Respondent submits that the jury had a sufficient basis for evaluating the truth of any prior statement of the child so that the objectives of the confrontation clause were achieved in this case. Accordingly, Respondent submits that this Court should decline to grant certiorari to consider questions previously resolved by this Court.

II. THIS COURT SHOULD DECLINE TO CONSIDER A FEDERAL QUESTION NOT PROPERLY RAISED BELOW.

Petitioner contends before this Court that the construction given by the Georgia Supreme Court of one phrase of the child hearsay statute, as discussed above, violates the separation of powers doctrine. This question was not raised in the motion for rehearing in the interlocutory appeal in the Georgia Supreme Court or as error on direct appeal to the Georgia Court of Appeals following trial. Instead, Petitioner raised this issue for the first time in the certiorari petition to the Georgia Supreme

Court after trial. Thus, this Court should decline to consider a federal question improperly raised and not decided below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Accordingly, Respondent submits this Court should decline to grant certiorari upon this basis.

III. PETITIONER WAS NOT DENIED THE OPPORTUNITY TO CROSS-EXAMINE THE CHILD BY THE GEORGIA STATUTE.

Petitioner contends that the statute as applied in this case denied him his constitutional right to "effective" cross-examination and due process. Petitioner urges that many of the rulings of the state courts in this case are erroneous under state law and asks this Court to sit as a "super" appellate court. Respondent submits that this Court's decision to grant certiorari is motivated by many reasons other than the perceived correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600 616-17 (1974).

Petitioner complains of the decision of the child's guardian ad litem who denied Petitioner's request prior to trial to interview the child. The Georgia Court of Appeals noted on direct appeal that under Georgia law, the "state may not deny defendant access to a witness material to the defense, but a witness cannot be compelled to submit to a pre-trial interview." *Sosebee*, 190 Ga. App. at 748. The state appellate court further relied upon *Pennsylvania v. Ritchie* regarding Petitioner's assertion that the denial of the request by the guardian ad litem denied him the right to "effective" cross-examination. *Sosebee*, 190 Ga. App. at 748-49. The state appellate court quoted language from *Ritchie* wherein this Court noted

that the confrontation clause was not a pre-trial rule of discovery. *Id.* The court also noted that the trial court had conducted an in camera inspection of the state files for material information as required by *Ritchie*.

The state appellate court also rejected Petitioner's assertion that he was denied an effective opportunity to test the competency of the child. The gist of the Petitioner's argument below was that he precluded from presenting extraneous information regarding the competency of the child *not* at the time of the pre-trial competency hearing but, rather, information allegedly relating to her competency at the time the child made statements to relevant authorities. *Sosebee*, 190 Ga. App. at 749. The state court noted that there was no such requirement under state law, particularly where competency is determined by whether the child understands the nature of the oath and is not tied to any mental state. *Id.* Indeed, Petitioner's argument on this issue before this Court addresses solely the propriety of this holding under state law so that Respondent submits no federal question is presented by this argument.

Finally, contrary to the Petitioner's assertions, Petitioner was given the opportunity to contest the reliability of the child's statements. Petitioner again complains of the lack of pre-trial disclosure of the "entire" DFACS file and the child's medical records. Petitioner ignores the fact that he was given ample opportunity to test these three witnesses on what they had heard. Respondent submits no abridgement of the confrontation clause is presented under these facts.

In conclusion, Respondent submits that no federal question not previously decided by this Court is presented by this allegation. Accordingly, Respondent would urge this Court to decline to grant certiorari for these reasons.

IV. THERE IS NO CONFLICT BETWEEN GEORGIA AND OTHER STATES STATUTES ON ANY FEDERAL QUESTIONS.

In the fourth issue before this Court, the Petitioner contends that the Georgia statute impermissibly conflicts with other state statutes, which, according to the Petitioner, allegedly require pre-trial disclosure by the state of certain materials. Respondent submits that pretermitted the question of any conflict, no federal question is presented by this claim as there is no federal right to general discovery in a criminal case. *Pennsylvania v. Ritchie*, 107 S.Ct. at 003; *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). That a majority of states may follow a particular criminal procedure does not in and of itself present a federal question, nor is a federal question "answered by cataloging the practices of other States." *Martin v. Ohio*, ___ U.S. ___ 107 S.Ct. 1098, 1103 (1987). Petitioner in effect asks this Court to rewrite the Georgia statute to require pre-trial discovery for a defendant. Respondent submits that such a request provides no basis for the granting of certiorari.

**V. PETITIONER'S POLICY ARGUMENT PRESENTS
NO BASIS FOR THE GRANTING OF
CERTIORARI.**

In his final issue before this Court, Petitioner contends that evidentiary procedures need to be established to protect parents from allegedly false child abuse allegations in custody battles. Petitioner asks this Court as a matter of public policy to grant certiorari in this case to consider what measures, if any, may be afforded parents in divorce proceedings in the face of allegedly false sexual abuse allegations. Respondent submits that such considerations, regardless of their merit, fail to identify a federal question for review by this Court and are more properly left to legislatures. *McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1756, 1781 (1987).

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that the federal questions presented to this Court for review were correctly decided under precedent of this Court and that no federal questions not previously decided by this Court are presented.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant
Attorney General

WILLIAM B. HILL, JR. 354725
Deputy Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant Attorney General

PAULA K. SMITH 662100
Assistant Attorney General

Please serve:

PAULA K. SMITH
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3351

